



OFFICE OF THE POLICE COMMISSIONER
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March 29, 2018

Memorandum for: Deputy Commissioner, Trials

Re: **Police Officer Dustin Dimpflmaier**
Tax Registry No. 954736
Patrol Borough Manhattan North
Disciplinary Case No. 2015-13886

The above named member of the service appeared before Assistant Deputy Commissioner Robert W. Vinal on July 21, September 9 and October 25, 2016, and was charged with the following:

DISCIPLINARY CASE NO. 2015-13886

1. Said Police Officer Dustin Dimpflmaier, on or about June 29, 2014, at approximately 2030 hours, while assigned to Patrol Borough Manhattan North and on duty, in the vicinity of 112 East 128th Street, New York County, used excessive force against Hasan Johnson, in that he attempted to strike Hasan Johnson in the face with his knee without sufficient legal authority.

P.G. 203-11

USE OF FORCE

2. Said Police Officer Dustin Dimpflmaier, on or about June 29, 2014, at approximately 2030 hours, while assigned to Patrol Borough Manhattan North and on duty, in the vicinity of 112 East 128th Street, New York County, placed Hasan Johnson into a chokehold.

P.G. 203-11

USE OF FORCE

3. Said Police Officer Dustin Dimpflmaier, on or about June 29, 2014, at approximately 2030 hours, while assigned to Patrol Borough Manhattan North and on duty, in the vicinity of 112 East 128th Street, New York County, obstructed the breathing of Hasan Johnson.

P.G. 203-11

USE OF FORCE

In a Memorandum dated December 30, 2016, Assistant Deputy Commissioner Robert W. Vinal found Police Officer Dustin Dimpflmaier Guilty of Specification Nos. 2 and 3, and Not Guilty of Specification No. 1 in Disciplinary Case No. 2015-13886. Having read the Memorandum and analyzed the facts of this matter, I approve the findings but disapprove the penalty for Police Officer Dimpflmaier.

In consideration of the totality of the circumstances, I deem that a lesser penalty is warranted. In this case, a violently resisting suspect was eventually subdued only upon the arrival of a sergeant who utilized a conducted energy device on the suspect. The extended period of time during which Police Officer Dimpflmaier and other officers attempted to control the suspect prior to the arrival and successful use of the conducted energy device placed the officers at risk of serious injury. Therefore, Police Officer Dimpflmaier is to forfeit five (5) vacation days, as a disciplinary penalty.


James P. O'Neill
Police Commissioner



POLICE DEPARTMENT CITY OF NEW YORK

December 30, 2016

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Dustin Dimpflmaier
Tax Registry No. 954736
Patrol Borough Manhattan North
Disciplinary Case No. 2015-13886

Charges and Specifications:

1. Said Police Officer Dustin Dimpflmaier, on or about June 29, 2014, at approximately 2030 hours, while assigned to Patrol Borough Manhattan North and on duty, in the vicinity of [REDACTED] used excessive force against Hasan Johnson, in that he attempted to strike Hasan Johnson in the face with his knee without sufficient legal authority.
P.G. 203-11 – USE OF FORCE
2. Said Police Officer Dustin Dimpflmaier, on or about June 29, 2014, at approximately 2030 hours, while assigned to Patrol Borough Manhattan North and on duty, in the vicinity of [REDACTED] placed Hasan Johnson into a chokehold.
P.G. 203-11 – USE OF FORCE
3. Said Police Officer Dustin Dimpflmaier, on or about June 29, 2014, at approximately 2030 hours, while assigned to Patrol Borough Manhattan North and on duty, in the vicinity of [REDACTED] obstructed the breathing of Hasan Johnson.
P.G. 203-11 – USE OF FORCE

Appearances:

For CCRB/APU: Jonathan Fogel, Esq.
Civilian Complaint Review Board
100 Church Street, 10th Floor
New York, NY 10007

For Respondent: Craig Hayes, Esq.
Worth Longworth & London
111 John Street
New York, NY 10023

Hearing Dates:

July 21, September 9, and October 25, 2016

Decision: Respondent is found Not Guilty of Specification No. 1.

Respondent is found Guilty of Specification Nos. 2 and 3.

Trial Commissioner:

ADCT Robert W. Vinal

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before the Court on July 21, September 9, and October 25, 2016. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. The Civilian Complaint Review Board (CCRB) Administrative Prosecutor called Hasan Johnson and Detective Leonardo Pino as witnesses. Respondent called Police Officers Kristen Lopez and Glen Barker as witnesses and testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, Respondent is found Not Guilty of Specification No. 1 and Respondent is found Guilty of Specification Nos. 2 and 3.

FINDINGS AND ANALYSIS

It is not disputed that on June 29, 2014, Respondent and his partner, Police Officer Glen Barker, were assigned to a foot post in the vicinity of 126th Street and Lexington Avenue, a busy residential and commercial area in Manhattan. At about 2030 hours, Hasan Johnson rode his skateboard from his girlfriend's apartment [REDACTED] to a nearby convenience store. Johnson rode his skateboard on the sidewalk past Respondent and Barker. The officers followed Johnson as he entered and exited the store and as he skateboarded

back to the [REDACTED] and entered [REDACTED] Officer Kristen Lopez and her partner, Police Officer Antola, were on duty at that time assigned to a foot post on the corner of [REDACTED] [REDACTED] which is in front of the [REDACTED] When Johnson entered the building, Lopez and Antola joined Respondent and Barker as they followed Johnson into the building. Inside the lobby, the officers attempted to issue Johnson a summons. Johnson backed away from the officers as they approached him and when they attempted to grab him, a struggle ensued. Johnson continuously resisted the efforts of the four officers to subdue him. The officers radioed for backup and additional officers and a sergeant responded to the scene. The sergeant used a Conducted Electrical Weapon (CEW) against Johnson. Johnson was then handcuffed and arrested. During their struggle with Johnson, both Respondent and Barker suffered concussions, both were treated at a local hospital and both were on sick report for one week in order to recover.

Johnson subsequently filed a lawsuit against the officers and the Department regarding this incident. Johnson received a payment from the City of New York in the amount of \$35,000.00 to settle his lawsuit.

A video recorded by a surveillance camera depicts Johnson entering the lobby and his physical encounter with the officers. Additional footage recorded by a bystander captured a few seconds of the struggle between Johnson and the officers. (CCRB Ex. 1-3).

Johnson testified at this trial that as he rode his skateboard on the sidewalk, he noticed a group of police officers walking ahead of him. In an attempt to avoid being ticketed for riding his skateboard on the sidewalk, Johnson transitioned from the sidewalk to the street. After he made the transition into the street, Johnson felt an officer place a hand on his shoulder. (T. 29). Johnson continued riding to the store, as none of the officers said anything to him or gave chase.

The group of officers then walked to the store and stood outside of the front of the store while Johnson was inside. Shortly thereafter, Johnson exited the store, walked past the officers standing outside and rode his skateboard back to his girlfriend's apartment building. The officers did not tell Johnson to stop. (T. 32).

When he arrived back at the apartment building, he walked past two female officers who were standing outside of the building. As he waited for someone to open the door in the lobby, a group of four officers, one of whom was Respondent, told Johnson to turn around and stop, he put his hands up, holding his skateboard in one hand. However, he decided to enter into the building because he was unsure as to why he was being stopped and he feared that he was going to be assaulted by the officers. (T. 74) One of the officers slapped the skateboard out of Johnson's hands, and Respondent and another officer "rushed" at him, grabbing his upper body. (T. 37). A tussle ensued and Johnson heard one of the officers ask him, "Why didn't you stop?" (T. 39). Respondent then grabbed Johnson by the back of the neck in a "Muay Thai clinch" as he tried to push Johnson's face into his knees three times. (T. 40). Johnson used his hands to block the blows from Respondent's knees.

Johnson described the events following the attempted knee strikes as a "free-for-all" with Respondent at one point wrapping his forearm around Johnson's neck. Johnson testified that as Respondent pressed down on his neck, he could not breathe and tried to pull Respondent's arm away from his neck. Respondent released his grip from Johnson's neck somewhat, but then reapplied even more pressure on his neck. Johnson could not recall how long Respondent did this. At some point thereafter, Respondent "threw [his] face into the wall and busted [his] lip." (T. 46). Johnson asserted that he did not give the officers his hands as Respondent choked him because he was "trying to fight for [his] life" by trying to remove Respondent's hands from his

neck. (T. 47). Johnson admitted that he had “resisted” the officers’ efforts to take him down to the floor by moving his feet from side to side, but he denied that he had fought back. (T. 76-77). Johnson denied that he had pushed any of the officers. (T. 90). He asserted that he had only “nudged” officers. Johnson was confronted with a statement he made at his CCRB interview on December 18, 2014. At this interview, Johnson stated, “I just like extended my hand to push him,” referring to an officer.

Respondent testified at this trial that Johnson initially rode his skateboard between him and Barker. Respondent and Barker then told Johnson to get off the sidewalk. Even though Johnson replied by displaying his middle finger and saying, “Fuck you,” (T. 210), Respondent and Barker let Johnson continue on without stopping him. It was not until they saw Johnson skateboarding between other people that they decided to follow him, intending to issue him a summons. (T. 210). They followed Johnson to the [REDACTED]. As he was entering the building, Respondent told him, “Stop!” Johnson backpedaled into the building’s lobby. The officers followed Johnson into the lobby as he ignored their repeated requests for him to stop. Respondent then reached out to grab Johnson’s arm to keep him from getting away. Johnson pulled his arm away, swatted Respondent’s hand away, and began flailing his arms. Johnson then backpedaled toward the elevator bank.

Respondent tried to gain control of Johnson’s hands as he resisted against the officers’ efforts to restrain him. As Respondent tried to gain control of Johnson’s hands, Johnson lunged toward him, throwing Respondent into a wall on which he struck his head. Respondent testified that he immediately fell to the floor and felt dazed. He then stood up, grabbed Johnson, pulled Johnson toward him, and attempted to knee him, though he is unsure if he his knee actually made contact with Johnson. Respondent asserted that at the Police Academy he was trained that any

part of a suspect's body could be targeted when executing a knee strike, and that he was never trained that striking a suspect in the face was a last resort when using force.

Respondent testified that after he attempted to strike Johnson with his knee, his memory of the rest of the altercation is "fuzzy." (T. 218). He did recall that he ended up on the floor with Johnson on top of him; that he grabbed Johnson "around his upper back" in an attempt to control him; (T. 219) and that he was finally able to "wiggle out from beneath" Johnson and ended up behind him. Johnson continued to violently resist as four officers tried to handcuff him. Respondent then grabbed Johnson "about the upper chest area" with his right arm. (T. 220) as hard as he could. (T. 235). Respondent denied that he had applied pressure on Johnson's neck. Respondent testified that the next thing he remembers is hearing someone tell him to move and that a CEW was then used against Johnson and he was handcuffed. Respondent recalled that he went outside to get some fresh air because he felt nauseous, his head ached, and his vision was blurry. Respondent was brought by ambulance to the hospital where he was diagnosed as having suffered a concussion.

Respondent recalled grabbing Johnson's head and thrusting his knee upwards towards Johnson's face, although he was not aiming for Johnson's face. He believed that by doing this he was using the minimum force necessary under the circumstances. (T. 251). He was not taught at the Police Academy that he should avoid striking a suspect in the head with a fist or knee if it was possible to avoid targeting the head. (T. 254). He could not recall how far his arm was from Johnson's neck when he wrapped his arm around Johnson's "upper sternum area." (T. 235-236).

Lopez testified that she and her partner were approached by Respondent and Officer Glen Barker. She could tell that they were looking for someone and when she asked, they told her they were looking for "a guy on a skateboard." (T. 116). Lopez had just seen a man riding a

skateboard enter the building, later identified as Johnson, so they attempted to enter. The building's door was locked and the officers were able to gain access to the vestibule area with the help of another individual who opened the door for them. All of the officers ordered Johnson to stop and asked to see his identification. (T. 118). Johnson did not comply with their orders and instead raised the skateboard he was holding into the air and started backing up. (T. 118). Barker knocked the skateboard out of Johnson's hands, and Johnson continued walking backwards further into the lobby, as the officers walked forward towards him. After Barker knocked the skateboard out of Johnson's hands, the officers tried to grab him and Johnson began flailing his arms. At one point, Johnson pushed Respondent, causing Respondent's head to hit a wall and causing Respondent to fall to the floor. (T. 121).

After Respondent fell to the floor, the four officers were physically attempting to handcuff Johnson, as he flailed and swung his arms around, and pushed the officers. (T. 122). During the course of their attempts to handcuff Johnson, the officers ordered Johnson to stop resisting. (T. 123). It was not until backup arrived and the responding sergeant used a CEW against Johnson, that the officers were able to finally handcuff him. Lopez did not see Respondent's arm up against Johnson's neck. She was about one foot away from Johnson at certain points during the struggle. (T. 130). Lopez testified that the training she received in the Police Academy regarding force included the instruction that striking an individual in the face should be used only as a last resort. (T. 133). Lopez did not see Respondent attempt to thrust his knee into Johnson's face. (T. 135). Lopez testified that although Johnson was pushing the officers and flailing his arms, she did not see Johnson punching anyone. (T. 136). When Johnson pushed Respondent, his hands were against his body and he used his full body to push

Respondent against a wall. (T. 137-138). Lopez never consider using deadly physical force against Johnson and she acknowledged that it was not a fight for their survival. (T. 141).

Barker testified that as he and three other officers were walking down Lexington Avenue, Johnson, riding his skateboard, came up from behind them and cut the group of officers off. (T. 161). Barker then told Johnson not to ride his skateboard on the sidewalk. Johnson turned around and said, "I'm not listening to you," and continued riding down Lexington Avenue. (T. 162). About five minutes later, Barker witnessed Johnson ride his skateboard in between four older women as he travelled westbound on the sidewalk. At that point, after having already given Johnson a warning, the officers decided to issue him a summons for riding on the sidewalk. He saw Johnson heading toward the [REDACTED] and he and Respondent followed him there. Officers Lopez and Antola were standing outside the [REDACTED]. As Barker and Respondent approached, they told Lopez and Antola that they were stopping Johnson, who was outside of the building. When they approached Johnson and asked for identification, he said, "no," and began backpedaling into the vestibule of the building. The officers entered the vestibule and again asked Johnson for identification. Johnson again said "no" and told the officers that they had no reason to stop him. (T. 165).

As Barker continued moving toward Johnson, he raised his skateboard to about shoulder height at Barker. Concerned that he would be hit with the skateboard, Barker knocked it of Johnson's hands as it was being raised. The officers then decided to arrest Johnson and tried to grab his arms. Johnson immediately pulled away and moved toward the building's elevators. The officers continued to order Johnson to stop resisting as they attempted, unsuccessfully, to put his arms behind his back so that he could be handcuffed. (T. 168). Barker described Johnson as "very strong." (T. 168). At some point, the four officers and Johnson fell to the ground. Barker

believes it was at that point he struck his head on either the floor or the wall. Barker then used his ASP to strike Johnson in the legs, "two times maybe," with no effect. Johnson continued resisting and Barker called for backup.

Barker acknowledged that as a result of the concussion he suffered, his memory of the altercation was affected. Barker has no recollection of his head hitting a wall. He may have blacked out for a period of time. Johnson did not allow the officers to handcuff him until the responding sergeant used a CEW against him. Barker did not see Respondent put his arm around Johnson's neck, only around Johnson's upper chest area. (T. 176-177).

Barker recalled that knee strikes were included in the use of force curriculum at the Police Academy. He was taught that striking a suspect in the face is a last resort when using force. (T. 182) He had no recollection of seeing Respondent use his knee to strike Johnson. (T. 184-185). He was trained that when executing a knee strike, the officer should grab the suspect around the head and pull the suspect into a bent knee as the officer brings the knee up. (T. 201).

Detective Leonardo Pino, the curriculum coordinator of the Police Academy's Physical Training and Tactics Department, is responsible for coordinating the curriculum for recruits and training all instructors. He testified that all recruits are taught 45 tactical lessons under the general principle that the minimum force necessary to effect an arrest or effect control should be used. Pino testified that recruits receive training on knee strikes. Specifically, recruits are taught that in close combat situations, a "knee stun" should be used to try to create space, if possible, or as a retaliatory technique. (T. 284-285). Pino described the knee stun as a technique in which a recruit is taught to grab either the subject's shoulders or head and try to bring them down, while at the same time trying to strike vulnerable areas of the subject's body with the knee to gain control. Vulnerable areas can include the face, chest area, kidney area, outside of the thigh,

groin, and ankles. The “knee stun” falls under the “impact” portion of the Department’s continuum of force. (CCRB Ex. 7). Pino testified that recruits are not taught that they cannot strike someone in the face with their knee. He asserted that if an officer is in a situation where he feels force is necessary and uses his knee to strike an individual in the face, he is acting consistently with his training. He acknowledged that in Police Academy training materials, the “vulnerable target areas” listed for the “knee-stun” are the thigh, lower abdomen, and groin, (CCRB Ex. 6) but he testified that those are merely suggested vulnerable target areas, and the areas cited are not meant to exclude other possible target areas.

The chronology of the relevant segments of the apartment surveillance recording (CCRB Ex. 1) are as follows:

- At or about 8:27:26
 - Johnson is seen walking backwards holding a skateboard in his right hand at his side as Respondent and Officers Barker, Lopez, and Antola walk towards him into the building lobby.
 - Officer Barker then knocks the skateboard out of Johnson’s hand as Respondent tries to grab him, who shakes Respondent off and backs further into the elevator vestibule.
- At or about 8:27:31
 - Respondent and Officer Barker both try to grab Johnson as he resists.
 - Officers Lopez and Antola join in trying to grab Johnson and the group moves from one side of the hall to the other.
- At or about 8:27:36
 - Respondent and Officer Barker fall to the ground and quickly stand back up.
- At or about 8:27:40
 - Respondent grabs Johnson about the head and thrusts his right knee up toward Johnson’s face.
 - Officers Barker, Lopez and Antola continue trying to gain control over Johnson.
- At or about 8:28:10
 - Respondent falls onto his back with Johnson on top of him. Officers Barker, Lopez, and Antola are on top of Johnson.
- At or about 8:28:17
 - Respondent escapes from under Johnson and comes to his knees. Johnson, also on his knees, appears to be attempting to stand up.
- At or about 8:28:19

- Respondent's places his right arm, bent at the elbow, under Johnson's neck. His fist is on the left side of Johnson's head.
- At or about 8:28:23
 - Johnson's is grabbing at Respondent's arm with both hands. Both Respondent and Johnson appear to fall back and another officer steps in front of the camera, blocking the view.
- At or about 8:28:24
 - The officers continue to struggle with Johnson who is on the floor until additional officers arrive.

A second, much shorter video, which was recorded by a bystander was offered into evidence. (CCRB Ex. 2). It captures Johnson's struggle with Respondent and the other officers from a closer vantage point than the surveillance footage detailed above. This 14-second video begins as Respondent gets to his knees after he was on his back underneath Johnson.

Although the second video provides a closer view, it does not provide much more clarity than the surveillance camera video. The video does, however, depict a moment during the officers' struggle with Johnson, when Respondent's right arm is seen wrapped around the front of Johnson's head and under Johnson's chin and Johnson's arm is seen grabbing Respondent's arm.

A third video, which is 15 seconds in length, was also offered into evidence. It depicts the backup officers who arrived at the scene as they are standing by the elevators. (CCRB Ex. 3).

CCRB Exhibits 4A-4K are still photo shots taken from the building's surveillance camera footage.

CCRB Exhibits 5A-5E are still shots taken from the bystander video. These photos include depictions of the moment when Respondent's right arm is wrapped around the front of Johnson's head, in front of Johnson's neck, and under Johnson's chin, and Johnson's arm is seen grabbing Respondent's arm. (CCRB Ex. 5 C, D & E)

Analysis**Specification No. 1**

Respondent is charged with using excessive force against Johnson by attempting to strike Johnson in the face with his knee “without sufficient legal authority.” After evaluating the trial testimony in its entirety, and examining the video recordings entered into evidence, I find Respondent not guilty.

Patrol Guide Procedure No. 203-11 delineates the standards to be followed when the use of force is necessary to achieve legitimate police goals. It specifically requires that members of service “at the scene of an incident” use the “minimum force” needed and that they “employ non-lethal alternatives, as appropriate.” This procedure also warns uniformed members of service that “excessive force will not be tolerated.”

The video evidence depicts that at one point during his struggle with Johnson, Respondent grabbed Johnson’s head and thrust his right knee up toward Johnson’s face. The Administrative Prosecutor argued that the Police Academy training materials he placed in evidence establish that officers are trained that a “knee-stun” can only be directed at the thigh, lower abdomen, and groin areas, because these are the only areas of the body specifically listed as “vulnerable target areas.” (CCRB Ex. 6). However, Detective Pino testified that the body areas cited in the training materials are merely suggested target areas, and are not meant to exclude other possible target areas.

Moreover, Pino corroborated Respondent’s claim that at the Police Academy he was taught that in close combat situations he could properly grab and pull the subject’s shoulders or head forward in order to strike the subject with his knee to gain control. Most significantly, Pino testified that officers are not taught that they can never strike someone in the face with their knee

and that if an officer is in a situation where he feels the use of such force is necessary and the officer uses his knee to strike the face of a violently resisting suspect, he is acting consistently with his training.

The video evidence supports the testimony of Respondent, Barker and Lopez that they were justified in using significant force to attempt to gain control of Johnson who struggled with the officers so violently that he injured two of them, by causing Respondent and Barker to suffer concussions, and that a sergeant who responded to the struggle found it necessary to use a CEW against Johnson in order to subdue him.

Most significantly, the video evidence shows that at the point when Respondent is seen grabbing Johnson's head and thrusting his right knee up toward Johnson's face, Respondent and Johnson are engaged in a close combat situation.

A recent disciplinary decision supports Respondent's position that where an officer uses a knee-to-head movement in order to overcome a suspect's violent resistance to being handcuffed, the officer's use of this technique does not constitute a wrongful use of force. See *Case No. 2015-13121* (signed Sept. 20, 2016), where an officer was found not guilty of wrongfully using force even though he had used his knee to strike a suspect in the head because the officer's action was not gratuitous but, rather, was performed in order to overcome the suspect's resistance so that the suspect could be handcuffed.

Since I find that the Administrative Prosecutor did not sufficiently prove that, under the specific circumstances presented here, Respondent's attempt to strike Johnson in the face with his knee constituted a use of excessive force, Respondent is found not guilty of Specification No. 1.

Specification Nos. 2 and 3

Respondent is charged with placing Johnson in a chokehold and thereby obstructing Johnson's breathing. After evaluating the trial testimony in its entirety, and examining the video recordings entered into evidence, I find Respondent guilty.

The Patrol Guide proscribes the use of chokeholds by officers as they carry out their duties. Section 203-11 states in pertinent part:

Members of the New York City Police Department will NOT use chokeholds. A chokehold shall include, but is not limited to, any pressure to the throat or windpipe, which may prevent or hinder breathing or reduce intake of air.

Thus, the Patrol Guide rules out chokeholds as a sanctioned option. Moreover, as written, what constitutes a chokehold under the Patrol Guide is broadly defined.

The Administrative Prosecutor offered Johnson's testimony to prove that Respondent had choked him and obstructed his breathing. If Johnson's testimony was the sole evidence presented by the Administrative Prosecutor to prove these charges I would find Respondent not guilty. I find that Johnson's testimony cannot be relied upon because on cross-examination he contradicted statements he made during his direct testimony and at his CCRB interview. He asserted that as he was skateboarding on the sidewalk he did not believe that what he was doing was illegal, but he later admitted that it was an offense for which he could receive a summons. Most significantly, although he asserted on direct examination that he had not pushed any officers at any point, on cross-examination he was confronted with a statement he made at his CCRB interview that he had extended his arm to push an officer, which directly contradicted his trial testimony. His explanation for this inconsistency (that he had "stated it wrong" at his CCRB interview) is not convincing. (T. 85).

However, the video evidence constitutes sufficient corroboration of Johnson's claim that Respondent used a chokehold against him and thereby obstructed his breathing. The video evidence clearly shows that at one point during the officers' struggle with Johnson, Respondent wrapped his right arm around the front of Johnson's head and underneath his chin and that he pulled Johnson's head back while in this position. Since Respondent's arm was directly in front of Johnson's neck, it is more likely than not that Respondent's action of pulling his arm towards him would have put pressure on Johnson's neck sufficient to partially close Johnson's windpipe and, thus, obstruct his breathing. (See CCRB Ex. 5 C, D & E) The video evidence supports Johnson's claim that Respondent's arm obstructed his breathing since Johnson is seen on the video pulling on Respondent's arm as his neck is being pulled backwards.

The video evidence establishes that Respondent used a chokehold against Johnson. However, since Respondent employed this chokehold as he was attempting to restrain a suspect who was violently resisting arrest, an analysis must be conducted as to whether this chokehold falls under the exception delineated by the Police Commissioner in *Case No. 2014-11368* (July 25, 2016).

In that case, the Police Commissioner found the Respondent officer not guilty even though video evidence established that the officer had used a chokehold to restrain an individual who was violently resisting arrest. The Police Commissioner noted in his decision that the officer in that case had "faced extreme danger during his lengthy struggle with the individual" because the individual was armed with a gun, and because the video evidence showed the challenges and the risks that the officer, and his fellow officers, had faced, which included having garbage cans thrown at them and being pulled at and physically interfered with by people in the hostile crowd surrounding the officers.

As a result, the Police Commissioner determined that the officer's "actions in attempting to effectuate an arrest and ensure the safety of the public, his partner, himself, and the armed individual, were lawful, proper, reasonable, and necessary, under the totality of the circumstances." Importantly, the Police Commissioner added that, "This decision does not sanitize or create a safe space for chokeholds generally but rather carves out an exception in very specific and exceptional circumstances."

There are significant differences between the factual situation presented in that case and the facts in the instant case. Here, Johnson was not armed, a hostile crowd had not gathered around the officers, no one threw items at them, and no civilians were interfering as they struggled to handcuff Johnson. Since Respondent was not faced with the type of extreme danger that the officer faced in the prior case, the exceptional circumstances cited by the Police Commissioner do not appear to be present here.

There is one final aspect to be considered regarding Respondent's use of a chokehold. It is not disputed that during his struggle with Johnson Respondent suffered a concussion when his head hit a hard surface and that he was treated at a local hospital and was on sick report for a week in order to recover. *Mens rea* is not a delineated factor in the Patrol Guide section banning chokeholds and the definition of what constitutes a chokehold focuses on the conduct itself rather than the intention of the officer.

Nonetheless, the fact that Respondent suffered a concussion during his struggle with Johnson raises the following question: Was he aware when he employed the chokehold on Johnson that he was applying pressure on Johnson's neck which may have prevented or hindered Johnson's breathing or reduced his intake of air? Based on his own testimony at this trial, I find that Respondent was aware of this.

Throughout his testimony at this trial regarding his recollection of his struggle with Johnson, Respondent continually stressed that because he had been pushed by Johnson causing his head to hit a wall, he remembered very little. He testified, "I hit it hard and...I don't remember much after the black and stars and, you know." (T. 215) When he was asked what was going through his mind after he hit his head, he answered, "I could get killed. I have to fight for my life because...I was dazed." (T. 215) When he was asked about what happened after he attempted to strike Johnson with his knee, he replied, "Most of it is fuzzy. I remember I ended up on the ground and him ending up on top of me," (T. 218) but that "most of the fight is a blur" because he was suffering "headaches." (T. 220) Finally, when he was asked, "In between that point where you were behind him and the point he was tased, do you have any memories of what was going on during the fight?" he answered, "No."

In contrast, when Respondent was asked about whether he had used a chokehold on Johnson, he testified with certainty that when he was behind Johnson, "I grabbed him about the upper chest area" not around his neck area. When he was asked if, when he grabbed Johnson from behind, he had used his arm to apply pressure, he answered, "No." (T. 220) When he was asked if he had ever squeezed either the side of Johnson's neck or the front of his neck, he answered, "No." (T. 221)

Respondent's claim that when he was behind Johnson, he wrapped his right arm around Johnson's upper chest area, not around Johnson's neck area, is not supported by the video evidence. Also, based on Respondent's consistent assertions that he had little recollection of his struggle with Johnson, I cannot credit his claims that he is certain that he did not apply pressure with his arm and that his arm never squeezed Johnson's neck.

In conclusion, I find that the record establishes by a preponderance of the credible evidence that Respondent placed Johnson in a chokehold and thereby obstructed his breathing. Therefore, I find Respondent Guilty of Specification Nos. 2 and 3.

PENALTY RECOMMENDATION

In order to determine an appropriate penalty, Respondent's service record was examined. See *Matter of Pell v. Board of Education*, 34 N.Y.2d 222 (1974). Respondent was appointed to the Department on July 9, 2013. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum. Respondent has no prior disciplinary record.

The CCRB Administrative Prosecutor recommended that Respondent forfeit 30 vacation days and serve one year on dismissal probation as a penalty.

In *Case No. 2014-12925* (signed Feb. 16, 2016), a 21-year officer with two prior disciplinary adjudications forfeited 15 vacation days for using an arm chokehold on an individual. In that case, as here, the individual was resisting arrest.

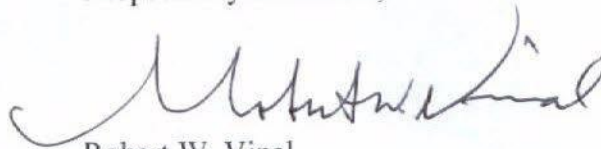
In a more recent decision, *Case No. 2015-13121* (signed Sept. 20, 2016), a 10-year officer who had no formal disciplinary record forfeited 15 vacation days as a penalty after he was found guilty at trial of having wrapped his forearm around an individual's neck in a chokehold during a physical altercation. The Police Commissioner disapproved the Trial Commissioner's recommended penalty of the forfeiture of 20 vacation days and imposed the 15 day penalty.

In a very recent decision, *Case No. 2015-14488* (signed Nov. 18, 2016), a 10-year officer who had no formal disciplinary record forfeited 20 vacation days as a penalty after he was found guilty at trial of using a chokehold against an individual who was resisting arrest. However, in that case, the manner in which the officer performed the chokehold was aggravated by the fact

that he held his asp, rather than his arm, on the individual's throat and applied pressure with the asp which may have prevented or hindered the individual's breathing.

Consistent with the above-cited cases where officers used arm chokeholds, and after having considered the totality of circumstances presented here including the fact that Respondent suffered a concussion as a result of his physical struggle with Johnson, I recommend that Respondent forfeit 15 vacation days.

Respectfully submitted,



Robert W. Vinal
Assistant Deputy Commissioner Trials

DISAPPROVED

MAR 29 2018


POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER DUSTIN DIMPFLMAIER
TAX REGISTRY NO. 954736
DISCIPLINARY CASE NO. 2015-13886

Respondent received an overall rating of 4.5 on his 2015 interim performance evaluation, 4.0 on his 22-month probationary evaluation, and 3.5 on his 10-month probationary evaluation. He has no medals. [REDACTED]

[REDACTED] He has no prior disciplinary record and no monitoring records.

For your consideration.

Robert W. Vinal
Assistant Deputy Commissioner Trials